

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROXANNE D. JACKSON and U.S. POSTAL SERVICE,  
POST OFFICE, Baltimore, MD

*Docket No. 03-1943; Submitted on the Record;  
Issued March 18, 2004*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether appellant has greater than a 14 percent permanent impairment of her right lower extremity for which she has received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On March 25, 1996 appellant, then a 39-year-old clerk/mail handler, filed an occupational disease claim alleging that she sustained a right knee condition as a result of pushing various mail containers for a year. On March 27, 1996 her physician drained fluid from her knee and gave her a cortisone shot. On July 16, 1996 appellant underwent arthroscopic surgery for a partial medial lateral meniscectomy and chondroplasty of the medial femoral condyle and patella

On October 31, 1996 the Office accepted that appellant sustained a right knee strain, a tear of the right knee medial meniscus and aggravation of right knee chondromalacia.

On November 17, 1996 appellant completed a Form CA-7 requesting a schedule award.

By report dated June 25, 1999, Dr. Robert W. Macht, an attending Board-certified surgeon, reviewed appellant's factual and medical history and indicated the results of his physical examination. He applied the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* to determine that appellant had no impairment of the right leg based on 10 degrees loss of flexion, a 2 percent impairment due to the partial medial meniscectomy, a 24 percent impairment, based upon the weakness model in Table 39, page 77 and an 8 percent impairment due to weakness for pain, which combined for a 30 percent permanent impairment of her right lower extremity.

On July 16, 1999 the Office medical adviser reviewed Dr. Macht's report and opined that appellant had a two percent permanent impairment for the partial meniscectomy using Table 64

of the A.M.A., *Guides*. The Office medical adviser opined that Dr. Macht did not use the A.M.A., *Guides* appropriately in rating appellant's weakness.

On January 27, 2000 the Office granted appellant a schedule award for a 2 percent permanent impairment of her right lower extremity for the period July 16 to August 25, 1997 for a total of 5.67 weeks of compensation.

Appellant disagreed with the schedule award and requested an oral hearing before an Office hearing representative, which was held on June 29, 2000.

By decision dated October 5, 2000, the hearing representative remanded the case to the Office for resolution of a conflict in medical opinion evidence found between the Office medical adviser and Dr. Macht.

On December 1, 2000 the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. David L. Kreisberg, a Board-certified orthopedic surgeon, to resolve the conflict. However, the referral letter noted the appointment was for a second opinion examination.

By report dated December 28, 2000, Dr. Kreisberg reviewed appellant's factual and medical history, noted her present complaints and reported his findings upon physical examination. He noted that appellant had pain and swelling and occasional locking involving the right knee with difficulty going up and down stairs and limited right knee flexion with the inability to run. Dr. Kreisberg noted that appellant had retained active flexion of 140 degrees and 0 degrees retained extension. He consulted the A.M.A., *Guides*, fourth edition, Table 64 and opined that appellant had a 10 percent permanent impairment of her right lower extremity. Dr. Kreisberg noted that appellant had no evidence of atrophy, gait disturbance or leg length discrepancy and that, although she complained of pain, she exhibited no weakness.

On March 15, 2001 the Office medical adviser reviewed Dr. Kreisberg's findings, noted the date of appellant's maximum medical improvement as December 28, 2000 and noted that she had a 2 percent impairment for a partial medial meniscectomy, using Table 17-33, page 546, a 12 percent impairment due to right lower extremity weakness of Grade 4 on extension, using Table 17-8, page 532 and a 0 percent impairment for flexion to 140 degrees, using Table 17-10, page 537.<sup>1</sup>

On March 19, 2001 the Office granted appellant an additional schedule award for 12 percent for right lower extremity for the period August 26, 1997 to April 24, 1998 for a total of 34.56 weeks of compensation, or a total schedule award for 14 percent permanent impairment of her right lower extremity.

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<sup>1</sup> The Office medical adviser referred to the fifth edition of the A.M.A., *Guides*. The fifth edition of the A.M.A., *Guides* became effective on February 1, 2001. See FECA Bulletin 01-05 (issued January 29, 2001) (awards calculated according to any previous edition should be evaluated according to the edition originally used; any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

In a March 30, 2001 letter, appellant, through her representative, requested an oral hearing before an Office hearing representative.

The Office determined that, because the referral letter issued to appellant noted it was made for a second opinion, the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Robert Riederman, a Board-certified orthopedic surgeon, selected as the impartial medical specialist.

By report dated April 9, 2001, Dr. Riederman reviewed appellant's medical history and noted her present complaints. He reported his findings upon physical examination and opined that appellant's symptoms were related to synovitis and degenerative disease of the right knee. Dr. Riederman opined that appellant was not a candidate for further medical treatment, that she had reached maximum medical improvement and had an eight percent impairment of her right lower extremity related to her knee. He noted that he had taken into account the factors of pain, weakness, atrophy loss of function and loss of endurance in making this impairment rating and that he used the A.M.A., *Guides*, fourth edition, for reference.

By letter dated April 24, 2001, the Office requested clarification of Dr. Riederman's April 9, 2001 opinion and requested that he use the fifth edition of the A.M.A., *Guides*.

In an April 30, 2001 supplement, Dr. Riederman responded that, "[b]ased on review of examination findings, as well as other available data, I do not feel that [appellant] has more than the 14 percent permanent and partial impairment of the right lower extremity awarded due to the effects of her March 25, 1996 work-related right knee injury and subsequent surgery." Dr. Riederman stated that he assigned an eight percent impairment related to degenerative disease and synovitis, which was not related to appellant's employment injury as a mail handler. He generally referred to the fifth edition of the A.M.A., *Guides* as reference for his impairment rating.

On May 21, 2001 an Office medical adviser reviewed Dr. Riederman's findings and indicated that it demonstrated a 12 percent permanent impairment for weakness, atrophy, pain and a medial meniscus tear, rather than an 8 percent permanent impairment.

By decision dated May 24, 2001, the Office found that appellant had no more than a 14 percent impairment of her right lower extremity for which she had previously received a schedule award.

In a June 1, 2001 letter, appellant, through her attorney, again requested an oral hearing before an Office hearing representative. On March 7, 2002 appellant's representative requested that the oral hearing be changed to a review of the written record. Appellant submitted an April 2, 2002 report from Dr. Neil Novin, a Board-certified vascular surgeon, who noted appellant's history of injury and described her present symptomatology. He reported that she had tenderness along the lateral joint line and pain in the area of the lateral collateral ligament with medial flexion and noted that her range of motion lacked 10 degrees of full extension and 20 degrees of full flexion. He opined that appellant's situation had deteriorated and that she probably had lateral collateral ligament damage and ongoing degenerative changes of the right knee, including chondromalacia of the patella. Dr. Novin referred generally to the A.M.A.,

*Guides* but, did not identify which edition he used in estimating that appellant had a 42 percent of the right lower extremity as a result of her March 25, 1996 work injuries.

By decision dated August 19, 2002, the hearing representative affirmed the May 24, 2001 decision finding that appellant had no more than a 14 percent impairment of her right lower extremity. The hearing representative found that Dr. Riederman's impartial medical reports constituted the weight of the medical evidence. The hearing representative found that Dr. Novin's report was of diminished probative value as he used speculative language and did not indicate which volume or tables of the A.M.A., *Guides* he relied upon in formulating his impairment rating.

In a letter dated September 27, 2002, appellant's representative requested reconsideration of the August 19, 2002 decision and submitted an August 30, 2002 report from Dr. Novin.

By decision dated June 5, 2003, the Office denied the reconsideration request. The Office found Dr. Novin's August 30, 2002 report to be irrelevant.

The Board finds that this case is not in posture for decision due to an unresolved conflict in medical opinion evidence.

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulation<sup>3</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>4</sup>

Section 8123(a) of the Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>5</sup>

In the present case, Dr. Macht determined that appellant had a 30 percent permanent impairment of her right lower extremity. He noted that appellant had no impairment of the right leg due to 10 degrees loss of flexion, a 2 percent impairment due to the partial medial meniscectomy, a 24 percent impairment, based upon the weakness model in Table 39, page 77 and an 8 percent impairment due to weakness for pain, which combined for a 30 percent permanent impairment of her right lower extremity.

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> *Id.*

<sup>5</sup> 5 U.S.C. § 8123(a); *see also* Charles S. Hamilton, 52 ECAB 110 (2000); Leonard M. Burger, 51 ECAB 369 (2000).

An Office medical adviser noted that Dr. Macht did not use the A.M.A., *Guides* correctly and found that appellant had a two percent permanent impairment of her right lower extremity due to the partial meniscectomy.

On October 5, 2000 an Office hearing representative found that there was a conflict between Dr. Macht and the Office medical adviser and remanded the case for referral to Dr. Kreisberg, as an impartial medical examiner. However, in making the referral, the Office did not properly advise appellant as to the conflict of medical opinion.<sup>6</sup> Therefore, the referral of Dr. Kreisberg was for a second opinion evaluation.

Dr. Kreisberg reviewed appellant's factual and medical history, conducted a physical examination and provided a narrative summary of her subjective complaints. He measured her degrees of retained active flexion and extension and determined that, in accordance with the fourth edition of the A.M.A., *Guides*, appellant had a 10 percent permanent impairment of her right lower extremity.

The Office medical adviser reviewed Dr. Kreisberg's second opinion findings upon examination and calculated that appellant had a 2 percent permanent impairment for the partial medial meniscectomy, using Table 17-33, page 546, a 12 percent impairment due to lower extremity weakness of Grade 4 on extension using Table 17-8, page 532 and a 0 percent impairment for flexion to 140 degrees, using Table 17-10, page 537.

The Office thereafter granted appellant a schedule award for a 12 percent permanent impairment of her right lower extremity, for a total of 14 percent.

The Office thereafter referred appellant, together with a statement of accepted facts, questions to be resolved and the relevant case record, to Dr. Riederman as an impartial medical examiner to resolve the conflict.

When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, must be given special weight.<sup>7</sup> However, Dr. Riederman did not initially provide such a well-rationalized report.

Dr. Riederman provided an April 9, 2001 report noting that appellant had reached maximum medical improvement and that her present symptoms were related to synovitis and degenerative disease of the right knee. His opinion took into consideration the factors of pain, weakness, atrophy, loss of function and loss of endurance in determining that appellant had an eight percent permanent impairment of her right lower extremity, citing the fourth edition of the A.M.A., *Guides*. The Board notes, however, that loss of endurance, as opposed to loss of

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<sup>6</sup> See *Robert D. Reynolds*, 49 ECAB 561 (1998) (for a conflict to arise under section 8123(a) there must be more than a simple disagreement between two physicians; there must be opposing reports of virtually equal weight and rationale).

<sup>7</sup> *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

strength described as weakness, is not a ratable impairment in accordance with the A.M.A., *Guides*.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.<sup>8</sup> When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative, or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.<sup>9</sup> Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act<sup>10</sup> will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.<sup>11</sup>

The Office sought clarification from Dr. Riederman and requested that he use the fifth edition of the A.M.A., *Guides*.

In an April 30, 2001 supplemental report, Dr. Riederman responded that, based on review of examination findings, as well as other available data and the fifth edition of the A.M.A., *Guides*, he did not feel that appellant had more than a 14 percent impairment of her right lower extremity awarded due to the effects of her March 25, 1996 work-related right knee injury and surgery. Dr. Riederman, however, did not explain why he believed that this was so, but he did explain that he had assigned an eight percent impairment related to degenerative disease and synovitis, for which the A.M.A., *Guides* do not specifically provide any impairment rating.<sup>12</sup> Therefore, he did not provide an impairment rating conforming to the protocols of the fifth edition of the A.M.A., *Guides*.

As Dr. Riederman's medical reports do not conform with the protocols of the A.M.A., *Guides*, his opinion is not sufficient to resolve the conflict of medical opinion found in this case.

Therefore, a conflict in medical opinion evidence remains and the case will be remanded to the Office for referral to an appropriate specialist for an impartial medical examination as to the nature and extent of appellant's employment-related impairment under the A.M.A., *Guides*, fifth edition.

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<sup>8</sup> *Harry T. Mosier*, 49 ECAB 688 (1998).

<sup>9</sup> *Id.*

<sup>10</sup> 5 U.S.C. § 8123(a).

<sup>11</sup> *Harold Travis*, 30 ECAB 1071 (1979).

<sup>12</sup> See *Lela M. Shaw*, 51 ECAB 372 (2000) (preexisting impairments are to be included in determining the amount of a schedule award). However, the A.M.A., *Guides* do not provide any specific rating for an inflammatory condition such as synovitis and degenerative disease is only addressed through arthritis-based symptoms such as joint-space narrowing, joint crepitation, pain or loss in range of motion, which were not reported in Dr. Riederman's opinion.

Because of the disposition of this case, the denial of the reconsideration issue is rendered moot.

The decisions of the Office of Workers' Compensation Programs dated June 5, 2003 and August 19, 2002 are hereby set aside and the case is remanded for further development in accordance with this decision of order of the Board.

Dated, Washington, DC  
March 18, 2004

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member